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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Appellant, v. DEAN HARRIS, Defendant and Respondent.	B219518 (Los Angeles County Super. Ct. No. BH003441)

APPEAL from an order of the Superior Court of Los Angeles County, Peter P. Espinoza, Judge. Affirmed.

Edmund G. Brown, Jr. Attorney General, Julie L. Garland, Senior Assistant Attorney General, and Gregory J. Marcot, Deputy Attorney General, for Appellant.

Nancy Tetreault, under appointment by the Court of Appeal, for Respondent.

SUMMARY

In 1986, Dean Harris was convicted of first degree murder with a firearm enhancement and sentenced to state prison for a term of 27 years to life. Six years ago, the Board of Prison Terms (Board) found Harris suitable for parole and set a parole release date. Although the time in which to do so had already passed, the Governor issued a reversal of the Board's decision, finding Harris unsuitable for parole. Four years ago, the trial court granted Harris's habeas corpus petition challenging the Governor's decision, noting an apparent effort to backdate correspondence to resurrect the lapsed deadline, and that order was not appealed. Accordingly, the Board reinstated Harris's parole grant and continued to hold progress hearings. Because of his consistently positive progress, the Board decided to advance Harris's release date twice, scheduling his release for August 2008.

That month, on the same day the Board advised Harris its decision advancing his release date had already become final, the Governor's office sent Harris a letter stating the Governor had invoked his authority to request an en banc review of the Board's 2004 decision to grant Harris's parole—the same determination the Governor had attempted (unsuccessfully) to reverse in 2005. In September, one month after Harris's scheduled parole release date, acting on the Governor's referral, the Board scheduled a rescission hearing for December.

Harris filed a motion seeking an order to show cause for the Governor's contempt of the court's prior order upholding the Board's grant of parole. Thereafter, the Board rescinded Harris's parole. Ultimately, after considerable briefing on the matter, the trial court issued an order to show cause and granted Harris's petition, finding the decision to rescind Harris's parole was not supported by any evidence. After requests to stay the trial court's order were denied by the trial court and this court in October 2009, Harris was released on parole.

The People (on behalf of Matthew Cate, the Secretary of the Department of Corrections and Rehabilitation, as Harris is on parole) appeal. Because there is no evidence Harris currently poses an unreasonable risk of danger to society, we affirm.

FACTUAL AND PROCEDURAL SYNOPSIS

On November 27, 1985, Dean Harris was convicted of first degree murder (Pen. Code, § 187) with a firearm enhancement (Pen. Code, § 12022.5). The trial court sentenced him to an indeterminate state prison term of 25 years to life for the murder, plus 2 years for the firearm use, and when judgment was entered on January 7, 1986, Harris had 312 days custody credit. His minimum parole eligibility date was October 29, 2002.

The Parole Board Record

August 17, 2004 Parole Consideration Hearing

Harris's Commitment Offense.

As the Board of Prison Terms stated for the record at the time of Harris's August 17, 2004 hearing, "'On December 24, Christmas Eve, of 1984[,] D[ean] Harris shot and killed Jimmy Owens . . . . Harris returned to the scene of an earlier argument between Gregory Harris and . . . Owens. Dean Harris had accompanied Gregory Harris. A physical confrontation occurred between Gregory Harris and Jimmy Owens. Gregory Harris told Dean Harris to shoot the victim. Dean Harris stepped from the vehicle and shot Jimmy Owens with a 12-gauge shotgun. Both Gregory Harris and Dean Harris then entered the vehicle and drove off."[1]

Presiding Commissioner Welch asked, "Is that what happened?"[2] Harris answered, "Yes." The Commissioner then asked, "Why did you commit this crime?"

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1 Gregory Harris was Harris's brother-in-law (his sister's husband).

2 At trial, Harris had relied on an alibi defense.

"It was a time—He had took some money from me. And he had told Greg Harris that he was going to give me my money back if I came around there. And I came around there with Greg Harris. Things had changed. I don't know what happened. They got to fighting. And they got—When they finished fighting, he came to me. And I asked him to stop three times. He wouldn't stop."

The Commissioner asked, "What do you mean he came at you?" Harris responded, "He was coming to me, coming to get me." Then the Commissioner asked, "And what did you do?" Harris said, "I had my leg broken in three places; I couldn't do nothing but stand there. . . . I had a brace on."

In response to further questioning, Harris recounted: "And Greg said, you'd better grab a gun. And he said, the gun is in the backseat. I didn't see no gun when I got in the car. He said it's up under them clothes. I can't reach in there and get the clothes, get no gun. He said, it's right there. Jimmy [Owens] just kept coming, so I moved the clothes. There was a gun there. . . . I grabbed the gun and I shot up in the air. And he kept coming. He said, [']You forgot who I was.[']" Then, "He turned like this, like he was going for the gun, and I shot at him" and "hit him." "He just kept on—He just kept on turning, like he was going to turn back around. I shot again, then I left. [Greg] said, come on, come on[,] so I left."

Asked how many times he shot Owens, Harris said, "Two times." Commissioner Welch challenged Harris, "[S]aid three times here." Harris answered, "It was two times. One in the air and twice at him."

Commissioner Welch asked, "You shoot him in the back?"

Harris responded, "No, I only shot him in the side."

The Presiding Commissioner then asked Harris how long he had known Owens. Harris said he knew him "because he was the bully of the neighborhood." Asked what he meant, Harris said, "He took what he wanted from anybody around there." Again, asked what he meant by that, Harris said, "He'd take cars, he'd take money, he'd take whatever—whatever he want from them and wouldn't nobody do nothing to him."

Harris was then asked how he felt about the shooting. "I feel real bad," he said. "I didn't have the right to take this man's life, Mr. Owens's life even though no material things is worth a life. Caused a lot of pain for his family."

Harris was asked who was older, and he said he thought Owens was but he was not sure.[3] Commissioner Welch then asked, "What type of money are we talking about?" Harris said, "Nine hundred dollars. I had just got paid from the guy that I painted the house with." Asked how Owens ended up with Harris's $900, Harris said, Owens "was down the street and seen us with the money. He was giving the money and he came and took it."

At that point, Commissioner Welch turned back to the appellate decision in Harris's case. "Here's what Dorothy Hubbard—Do you know who Dorothy Hubbard is?" . . . 'Dorothy Hubbard heard the shots and saw Owens fall. She saw two black men, one tall, one stocky, standing by a blue car parked in front of the house. She identified [Harris] as the man on the passenger side of the vehicle. Theodore Davis saw [Harris] pull out a [shot]gun or a rifle. After he heard [Harris again] tell Owens to ['stop,'] Davis pulled his little brother out of the way. He then heard two shots and a car door slam. He saw the blue Cadillac leave. Timothy Jones also saw the blue Cadillac drive past—I [sic, and] noted the [last] three numbers on the license plate. Police Officer Ricky Petty went to the scene of the shooting and found an adult black male lying face down on the ground. He had been injured by a shotgun blast. Officer Petty found three shotgun shells. Terence Allen, forensic pathologist and deputy medical examiner at the Los Angeles County Coroner's Office, performed an autopsy on the victim and concluded his injuries were consistent with two shotgun blasts. The blue Cadillac was impounded and dusted for fingerprints. The police found only Greg Harris'[s] prints on the car[,] not those of [Harris]. The murder weapon was never recovered."

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[3] According to the medical examiner, Owens appeared 10 years older than his actual age (23).

Harris was asked what happened to the shotgun but said he didn't know. Greg Harris drove him home and left; he didn't know what Greg Harris had done with it.

Prior Criminal History

Apart from his commitment offense, Harris confirmed he had never been arrested as a juvenile or as an adult. He volunteered that, just after he got out of the hospital for his leg, he had been detained at his brother-in-law's house because of "some stuff there in his [brother-in-law's] garage," but he (Harris) was not arrested.

Social History

Harris was one of 11 siblings, and he had grown up in a "very stable home environment," in an "intact home with both parents." He was not a gang member. His sister had divorced Gregory Harris (the man involved in Harris's commitment offense). Regarding any problems his siblings had with law enforcement agencies, Harris reported that one brother had been drinking a lot but was doing well now.

Harris had graduated high school and had worked as a grounds maintenance worker for the City of Compton, as a retail stock clerk, and, at the time he committed his crime, he was working as a painter. He had three children and was in contact with them every week, writing them letters. Harris said they were doing well—no gang involvement and no problems with law enforcement agencies; they played sports (football). The Commissioner commented, "It sounds like you're very proud of them." Harris responded, "Very proud." Harris said he had never been affiliated with a gang, had never used any illegal substance and never drank.

Harris's Post-Conviction History

Deputy Commissioner Lushbough noted Harris had been received into Department of Corrections custody on January 14, 1986. His last hearing was on May 22, 2003, and he had been denied parole for one year. Commissioner Lushbough reviewed Harris's further progress from May 2003.

Conduct and Discipline

Commissioner Lushbough noted that Harris's classification at reception had been 47, but he had reduced it down to 0 by 1995, and it became the "19 mandatory placement score in 2003."[4] He had "no 115's" for discipline. He had a total of four "counseling chronos, the 128's" in his prison history, but the most recent one was in 1992. He said he had been late to vocational dry cleaning three times that year. "If you're late just two minutes, you're absent." Since that time, he had gone 12 years without any counseling.

Work History

He had a "total TABE score of 11.5" as of 1992.[5] He completed dry cleaning in 1991 and 1992. He completed painting and decoration in 1993 through 1996. For the last two years, he had been working in maintenance painting with "above average to exceptional grade reports." There were comments from his supervisor indicating he was a "very good worker" and a "self-starter."

Programs and "Laudatory" Contributions

Regarding self-help and other groups, he was involved in the Children's Holiday Activities in December 2002 and Fatherhood and Anger Management in April 2003. He received a "laudatory chrono" in December 2003 for Operation Courage, a "fundraiser to

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[4] "The classification of felon inmates shall include the classification score system as established. A lower placement score indicates lesser security control needs and a higher placement score indicates greater security control needs." (Cal. Code Regs., tit. 15, § 3375, subd. (d)); and see Regs., tit. 15, § 3375.1, subd. (a) ["Except as provided in section 3375.2, each inmate shall be assigned to a facility with a security level which corresponds to the following placement score ranges: (1) An inmate with a placement score of 0 through 18 shall be placed in a Level I facility. (2) An inmate with a placement score of 19 through 27 shall be placed in a Level II facility. . . ."]; tit. 15, § 3375.2, subd. (g) ["An inmate serving a life term without an established parole date of three years or less, shall not be housed in a Level I facility nor assigned to a program outside a security perimeter."].)

[5] "The TABE (tests of adult basic education) score reflects an inmate's educational achievement level." (*In re Roderick* (2007) 154 Cal.App.4th 242, 253, fn. 5, citation omitted.)

provide some of the amenities, clothing and food and things to the fellows overseas." He had also completed some Cal-OSHA training in October 2002.

Psychological Evaluations

Harris's most recent psychiatric report was prepared by Dr. Hewchuk, Ph.D. in February 2003. Dr. Hewchuck noted no disorders. Regarding his assessment of Harris's dangerousness, Dr. Hewchuck opined: "'Inmate Harris'[s] violence potential within a controlled institutional setting is considered to be minimal relative to other inmates in this population. This conclusion is based on several factors. Prior to the instant offense there's no evidence of any criminal involvement. During the many years of incarceration for the instant offense, inmate Harris'[s] record is significant in its total absence of 115 violations. He had never been cited for any violent or any other type of rule infraction. There is no evidence of an alcohol or drug abuse history nor has . . . inmate Harris ever been treated for these conditions. His family has remained loyal to him during his incarceration and will provide a strong support system after he's released. Both from an actuarial and a clinical perspective, inmate Harris does not fit the habitual criminal profile. As a result, this inmate poses one of the lowest violence risk [sic] of any inmate currently in this institution. If released to the community, inmate Harris'[s] *violence potential is estimated to be below that of the average citizen in the community*.'" (Italics added.)

Parole Plans and Letters

If paroled, Harris said he planned to live with his sister Barbara Sanford, a probation officer (Los Angeles County), and his niece Makeba Thomas (Sanford's daughter), a custody officer with the Los Angeles County Sheriff's Department. He planned to support himself by working in his cousin's detail shop.[6] In addition, he said, his sister would keep him working and volunteering when he was not working at the detail shop—coaching football and baseball "at the parks" as he had been doing in the

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6 The Presiding Commissioner commented Harris had two vocations—painting and decorating and dry cleaning.

past. In addition, the Board read letters from his aunt and niece expressing their support for Harris. Sanford said she loved Harris, and "I know he is sorry for what happened." Thomas also wrote about how much she loved Harris and said, "I totally support him and feel like he deserves a second chance to show society that he is capable of being a good citizen and that he is a changed man. He's very remorseful for what has happened." She said he had used his time in jail (nearly 20 years) "to become a better man"—"reading, learning and praying and [writing] letters to family and friends." "[W]hen he writes i[t']s as if he wants everything to be meaningful. He express[es] love and compassion to show how we should be at every moment . . . ." Other letters from the prior hearing were noted to be in the file as well.

District Attorney's Remarks

Deputy District Attorney Sousa attended the hearing to oppose Harris's parole. Based on his record, Sousa said, "except for one salient aspect of his testimony today, [Harris] would appear to be a potentially good candidate for a parole date." After noting all the positive factors weighing in favor of parole, Sousa said, "my problem is the inmate's version of what he says happened. [B]ecause it dramatically differs from the truth of what occurred in this killing, it tells me . . . that there's a problem with this inmate's insight or more specifically lack of insight." He read from the autopsy report which he confirmed was in the legal documents section of Harris's central file and said Harris's claim Owens was coming at him was contradicted by the fact that the "major, large pellet wounds, all of them, entered the back of the victim." Also, there was "'no evidence of close range fire,'" Sousa said, "which tells me that the victim was not close enough to have been a threat to the inmate." "Now if he's had time to fire a shot in the air and then the victim still keeps coming and he shoots at him, why would you not have shotgun wounds in his chest?" "What it does tell me is that the victim was not in the act of threatening this inmate but was probably running away from him when he was shot in the back."

According to the correctional counselor's report, Sousa argued, Harris said Owens "was known as a neighborhood bully who used his six foot eight inch frame and 250 pounds to terrorize the neighborhood." However, while Harris was "very, very dead on about the weight," Sousa said, Owens was only "six foot one inch, hardly someone who is six-foot-eight and would appear to be so menacing." The fact Harris was "not an accurate historian of the truth," he argued, "tells me that he lacks the proper insight into the motivation and rationale behind the crime. . . . [H]e needs further time to come to grips with the truth of how this victim was killed."

Harris's Counsel's Closing

Harris's counsel asked the panel to "once again find him suitable for parole as did happen in a split decision in 2002," and asked the panel to incorporate the "enlightening" comments of Deputy Commissioner Garner-Easter on January 15, 2002, at pages 84, line 21, through page 89, line 1. He reiterated the factors supporting Harris's suitability for parole, emphasizing Harris's "remarkable" discipline-free history and the view "echoed by the psychological evaluators over the years" that Harris would pose a low degree of threat if released to the community. Regarding the "alleged inaccurate statements, I think there's room for reasonable minds to differ as far as the description of what happened the day that [Owens] was killed. Mr. Harris stands about five foot seven and if the town bully, a real brute, is only six foot one that's still half a foot larger and carrying a lot of extra weight and of course [Owens] had this menacing background leading up to the crime of commitment. So I think it's unfair to characterize Mr. Harris is intentionally misrepresenting the facts. I've looked at the autopsy diagrams and the pellet wounds are not square on the back. They are consistent with what Mr. Harris said, that [Owens] was making a turning motion and in fact there are pellet wounds to the side of the head is my understanding. For those reasons I don't believe Mr. Harris is coming in here to intentionally misrepresent what he perceived that day. He's appropriately remorseful and he's done the best he can to better himself since he's been here. It would be appropriate to once again set a date. And also, Mr. Harris at the time was disabled with a leg broken

in three places and in a brace, someone who would not be able to defend himself against the reputed neighborhood bully. . . ."

Harris's Closing Statement to the Board

In closing, Harris added, "I understand that I made a mistake. I made a harsh mistake and I didn't have a right to take this man's life. And I didn't have a right to cause the pain that I did to his family or to mine or the people in the community. And I'd just like to say I'm sorry for what I done."

The Board's Decision Granting Parole

When the panel returned from taking a recess, the Presiding Commissioner announced that the panel found Harris "suitable for parole and would not pose an unreasonable risk of danger to society or a threat to public safety if released from prison." He noted that Harris had "enhanced his ability to function within the law upon release through participation in [an] array of self-help programs over the years," including Breaking Barriers, Alternatives to Violence, Violence Project West, Life Skills, Fatherhood, Parenting Education, Successful Tools of the Master, Tool Quality Management, Fatherhood Lecture II. In addition, he had a viable skill prior to coming to prison (painting) and he had enhanced his ability through vocational programs including vocational dry cleaning and painting and decorating. Other than the commitment offense, he had no history of any other violent crimes. He had double-checked, and the only thing was a 1984 arrest for a Health and Safety violation—possession—and there was no disposition on that. After reviewing the letters, it appeared Harris had maintained close family ties.

"Because of maturation, growth and understanding and advanced age it has reduced the probability of recidivism and I think a lot of that's contained in the psychological evaluation. It shows [Harris] has matured. [He] does show signs of remorse. He indicates that he understands the nature and the magnitude of the offense committed. And I think what's really important is that . . . he has the desire towards . . . good citizenship. And looking at the correctional counselor's report: 'Considering the

commitment offense, prior record and prison adjustment, the writer believes [Harris] would pose a low degree of threat to the public if released at this time.' So the correctional counselor, after reviewing [Harris's] C-File and interacting with him, feels that [Harris] would pose a low degree [of risk] and he feels that [Harris has] a desire to change towards good citizenship. And I think that's real important coming from a correctional counselor because I review a lot of these and most of the time it's moderate—high degree of threat. So for a correctional counselor to say . . . the prisoner would pose a low degree of threat I think that's significant, it's very significant. Psychological factors."

Similarly, the Presiding Commissioner emphasized Harris's psychological evaluations. He read passages from the most recent evaluation completed in February 2003, into the record and commented, "Now that's quite a mouthful there to say that the inmate poses one of the lowest violence risks of any inmate currently in the institution, so apparently this doctor [Dr. Hewchuck] really believes in [Harris]." In addition to Dr. Hewchuck, Dr. Steven J. Terrini, reported in 1998, that he believed Harris's "violence potential is below the average citizen." The Presiding Commissioner stressed, "I did personally go through and I reviewed all your disciplinaries in the file. And I wanted to make sure it's perfectly clear on the record you do have some 128 minor write-ups in the file. We did consider those." The first was from May 1987 for covering his cell windows. In addition, as Harris had acknowledged, he had three for failure to report to work/absence from assignment in 1992. "I did a thorough review of the C-File."

July 11, 2007 Progress Hearing

At the start of Harris's July 2007 progress hearing, the panel read from a "Miscellaneous Decision" documenting that Harris had been found suitable for parole on August 17, 2004, and the "hearing panel set a parole date of March 2nd, 2008."[7] The

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[7] On September 24, 2006, pursuant to the court's order, the Board Executive Office signed a miscellaneous decision reinstating the Board's decision finding Harris suitable

Governor had reversed that decision, but the trial court granted Harris's habeas petition, finding the Governor's reversal not supported by law. Harris had no 128s or 115s whatsoever. He maintained custody level "Medium A custody." He was working as a porter, and his supervisor reported Harris had "exceptional work habits." According to his Life Prisoner Progress Report, he had gotten "above average grades." He continued to attend programs—Alternatives to Violence and Anger Management and had completed a 26-hour Self-Confrontation course through church. He said he had learned from that program and had been sharing it, and he described the various courses he was attending.

Harris told the panel, "Being in a situation like this and being that, you know, being that you have a date don't mean that you don't still need help. I mean, I need help in different ways that got me here, so I continue. I won't let going home stop me from programming." He said he had been learning communication skills, as far as how to deal with an argument, and how to retreat from being angry. He said this type of knowledge would have helped him to prevent his commitment offense. He was in contact with the Work Force Development program. He had letters confirming he still had a place to live with family and a job if released. He said he was "staying out of trouble and trying to stay healthy"—three miles a day, reading and writing, writing letters home and to the community and going to prayer in addition to working and attending his programs although space was limited because of overcrowding. "Whatever come open. I just put my name on every list that come up."

The panel found "nothing other than positive progress." Both commissioners urged him to "Keep up the good work." He was told they were in the process of calculating his good time and he would be advised of the calculation very soon.

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for parole and reinstated his release date. At that time, Harris's release date was defined as March 2, 2008.

May 28, 2008 Progress Hearing

At this hearing, Harris was told that in a January 15, 2008, Memorandum Decision, the Board noted his release date had been "inadvertently" stated as March 2, 2008. At the July 11, 2007 hearing, Harris's parole date was actually advanced 11 months to November 8, 2008, and the hearing that day would determine whether his date could be advanced even further. Harris was working in the kitchen, had remained discipline-free, tried to continue with programs but nothing was offered at that time, his parole plans remained in place and parole had been out to visit his family in April and May. "I've just been trying to stay clean and work." The Presiding Commissioner noted it was no fault of Harris that he had been unable to attend any more programs as he had transferred to another yard and nothing was available.

At that time, the panel told Harris, "We've got good news for you. We don't see any reason why we can't advance your date up a little bit more than what it is right now." As the Board was authorized "to go four months a year," but it hadn't been quite a year since his last progress report, the Presiding Commissioner said the panel's recommendation was to move Harris's date up "three months, which will put it in August," and that would give legal time to do a decision review. He was encouraged to just make sure his parole plans were in place and "stay out of trouble."

In a letter dated August 18, 2008, the Board of Parole Hearings Decision Processing and Scheduling Unit informed Harris: "Your progress hearing was conducted on May 28, 2008. *Decision Review is completed and the final decision date of your hearing is August 15, 2008. The decision has been approved*. [¶] Attached is the last 'Decision Page' with the stamped final date and a front cover sheet to your transcript. Please incorporate these pages in your copy of the hearing transcript." (Italics added.) The "Decision Page" states: "Parole date advanced three months[.] This decision will be *final* on August 15, 2008."

The Governor's Request for En Banc Review

In a letter dated August 15, 2008, from the Office of the Governor, Harris was advised that, pursuant to Penal Code section 3041.1, the "Governor has invoked his authority to request en banc review of the Board's decision to grant parole in [his] case. The Governor's statement of reasons for his decision is attached."[8] The attached document, entitled "Indeterminate Sentence Parole Release Review," was dated August 14, 2008. The Governor said Harris had changed his story and it was inconsistent with the appellate decision in his case. "At age 48 now, after being incarcerated approximately for only 23 years of his 27-years-to-life sentence, Dean Harris made some creditable gains in prison." However, "I believe the Board gave inadequate consideration to the gravity of the first-degree murder perpetrated by Mr. Harris, and that there are other public safety concerns regarding whether he accepts full responsibility for his actions." Because he believed Harris would pose an unreasonable risk of danger to society if released, he said, he requested the Board's en banc review.

A one-page list entitled "Board of Parole Hearings En Banc Decisions[,] Tuesday, September 16, 2008," identifies Harris's name under the heading "En Banc Review[,] Pursuant to Government Code section 11126(c)(4)," "Governor Referred," and

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[8] Penal Code section 3041.1 provides: "Up to 90 days prior to a scheduled release date, the Governor may request review of any decision by a parole authority concerning the grant or denial of parole to any inmate in a state prison. The Governor shall state the reason or reasons for the request, and whether the request is based on a public safety concern, a concern that the gravity of current or past convicted offenses may have been given inadequate consideration, or on other factors. When a request has been made, a randomly selected committee comprised of nine commissioners specifically appointed to hear adult parole matters and who are holding office at the time, shall review the parole decision. In case of a review, a vote in favor of parole by a majority of the commissioners on the committee shall be required to grant parole to any inmate. In carrying out any review, the board shall comply with the provisions of this chapter."

"Decision: Schedule a rescission hearing pursuant to the issues identified in the Governor's referral."[9]

On December 2, 2008, Harris (through his attorney) filed an "Ex Parte Motion for Issuance of an Order to Show Cause Why the Governor and CDCR Should Not Be Held in Contempt of Court for Refusing to Obey this Court's Binding Order that Petitioner Be Released on Parole." The People opposed the motion on various grounds, including the fact Harris had failed to file a verified petition.

In the meantime, on December 12, 2008, the Board rescinded Harris's parole for the reasons articulated in the Governor's statement in support of his referral for en banc review. More specifically, the Presiding Commissioner Drummond stated the Board's "good cause finding was based upon the facts of the crime" and "statements made by inmate Harris were in contradiction to the Appellate record, were minimizing the enormity of the crime, and showed that Harris has no evidence of understanding insight." Harris was told he was unsuitable for parole and "require[d] at least another three years incarceration."

Ultimately, after explicitly ordering that the issue to be addressed was the validity of the Board's rescission decision, and allowing the parties extensive time and opportunity to brief the issue, the trial court granted Harris's petition, finding "no evidence" that, notwithstanding the "heinousness of the twenty[-]year[-]old commitment offense," the "granting panel failed to consider any evidence or misstated any relevant facts that would indicate [Harris] currently presents an unreasonable risk of danger to society." Accordingly, the Board's December 18, 2008, rescission was vacated, and the August 17, 2004 grant of parole was reinstated. Harris was "ordered released in accordance with the parole date calculated by the Board." The trial court and, on October

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[9] Subdivision (c)(4) of Government Code section 11126 states: "Nothing in this article shall be construed to . . . prevent a state body from holding a closed session when considering and acting upon the determination of a term, parole, or release of any individual or other disposition of an individual case . . . ."

13, 2009, this court denied stay of enforcement of the trial court's order, and Harris was subsequently released from prison and remains on parole.

The People (on behalf of Secretary Cate) appeal.

DISCUSSION

I. The Trial Court Had Jurisdiction to Rule on Harris's Challenge to the Board's 2008 Decision to Rescind his Parole.

Penal Code section 1473, subdivision (a), provides: "Every person unlawfully imprisoned or restrained of his liberty, under any pretense whatever, may prosecute a writ of habeas corpus, to inquire into the cause of such imprisonment or restraint." According to the People, the trial court lacked jurisdiction to address the merits of the Board's 2008 rescission decision because Harris had not challenged this decision in a verified petition, and new issues are not properly raised in a traverse.

On December 2, 2008, when Harris filed his initial motion for contempt (construed as a petition for habeas corpus), the Board had scheduled—but not yet conducted—its rescission hearing.[10] Ten days later, the Board rescinded Harris's grant of parole. In his traverse, Harris asked the trial court to "[r]everse the Board's 2008 order rescinding its 2004 grant of parole," arguing the Board's decision to rescind his parole—"only after the Governor made clear to the Board he did not want [Harris] released from prison"-- was "no[t] . . . supported by good cause." While the Board was obligated to make its own decision as to his suitability, Harris argued, the "[un]justified" rescission decision revealed the Board's lack of independent judgment in acting only on the basis of the Governor's efforts to "force the Board" to do so, and argued, with citations to supporting legal authority, the Governor's reasons (which resulted in the Board's rescission decision) were insufficient as there was no evidence in the record to support

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[10] In their reply brief, the People acknowledge there is no dispute the trial court could construe the initial motion for contempt as a petition for writ of habeas corpus.

the conclusion he currently posed an unreasonable risk of danger to public safety as required under *In re Lawrence* (2008) 44 Cal.4th 1181, 1191.

In its April 2009 order addressing Harris's initial petition for writ of habeas corpus, the trial court stated as follows: "In the traverse, petitioner also challenges the rescission of his parole date on the grounds that it was not supported by good cause. However, this argument was not made in the Ex Parte Motion for Issuance of an Order Show Cause why the Governor should not be Held in Contempt of Court. In a habeas proceeding, 'the factual allegations of a return must also respond to the allegations of the petition that form the basis of the petitioner's claim that the confinement is unlawful.' ([*People v.*] *Duvall*[(1995)] 9 Cal.4th [464,] 476.) Because petitioner did not raise the issue of cause in the original motion, respondent did not brief this issue in the return. This Court cannot fairly decide the issue without allowing respondent an opportunity to respond. Therefore, respondent is ordered to show cause why the petition should not be granted based on the issue of good cause to rescind and shall file a return within 30 days of service of this order. . . ."

The People responded with a request that the court vacate its order because Harris's "'petition'" was unverified and failed to plead facts establishing a prima facie case for relief or, in the alternative, grant an extension to file the return. The trial court denied the request for vacation of its prior order, but granted the People a 30-day extension to file the return.

The People concede that return addressed the merits of the Board's 2008 rescission decision. Harris's traverse gave notice of the issue. The trial court gave the People ample opportunity to address the issue, and the People addressed it. On this record, the People have failed to establish prejudicial error in connection with the trial court's ruling on the merits of the Board's rescission decision.

II. The Board's Decision to Rescind Harris's Parole Was Not Supported by "Some Evidence" Harris Poses a Current Risk of Danger to Public Safety.

Applicable Law.

Preliminarily, we note that it is unclear on this record whether the Governor acted timely in requesting an en banc hearing; whether the en banc hearing was in fact the rehearing contemplated by statute; and whether the proper standard was applied to order a rescission hearing. Assuming without deciding that all of the necessary procedural steps were timely and proper, however, the ultimate decision at the rescission hearing must be measured against the standard established by our Supreme Court—"whether 'some evidence' supports the conclusion that the inmate is unsuitable for parole because he or she currently is dangerous." (*Lawrence, supra,* 44 Cal.4th at p. 1191.)

"[W]hen a court reviews a decision of the Board or the Governor, the relevant inquiry is whether some evidence supports the *decision* of the Board or the Governor that the inmate constitutes a current threat to public safety, and not merely whether some evidence confirms the existence of certain factual findings. [Citations.]"[11] (*Lawrence, supra,* 44 Cal.4th at p. 1212, original italics.) The reviewing court must uphold the decision denying parole if "'some evidence' in the record supports the conclusion that petitioner poses an unreasonable public safety risk . . . ." (*In re Shaputis* (2008) 44 Cal.4th 1241, 1255 (*Shaputis*).)

Every inmate "is entitled to a constitutionally adequate and meaningful review of a parole decision, because an inmate's due process right 'cannot exist in any practical sense without a remedy against its abrogation.'" (*Lawrence, supra,* 44 Cal.4th at p. 1205, quoting *Rosenkrantz, supra,* 29 Cal.4th at p. 664.) "[I]n light of the constitutional liberty

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11 As the trial court's decision to grant Harris's petition for writ of habeas corpus was based solely on documentary evidence, we review this decision de novo. (See *In re Rosenkrantz, supra,* 29 Cal.4th at p. 677.)

interest at stake, judicial review must be sufficiently robust to reveal and remedy any evident deprivation of constitutional rights." (*Id.* at p. 1211.)

"[T]he determination whether an inmate poses a current danger is not dependent upon whether his or her commitment offense is more or less egregious than other, similar crimes. [Citation.] Nor is it dependent solely upon whether the circumstances of the offense exhibit viciousness above the minimum elements required for conviction of that offense. Rather, the relevant inquiry is whether the circumstances of the commitment offense, when considered in light of other facts in the record, are such that they continue to be predictive of current dangerousness many years after commission of the offense. This inquiry is, by necessity and by statutory mandate, an individualized one, and cannot be undertaken simply by examining the circumstances of the crime in isolation, without consideration of the passage of time or the attendant changes in the inmate's psychological or mental attitude. [Citations.]" (*Lawrence, supra,* 44 Cal.4th at p. 1221.)

"In sum, the Board or the Governor may base a denial-of-parole decision upon the circumstances of the offense, or upon other immutable facts such as an inmate's criminal history, but some evidence will support such reliance *only* if those facts support the ultimate conclusion that an inmate *continues* to pose an unreasonable risk to public safety. [Citation.] Accordingly, the relevant inquiry for a reviewing court is not merely whether an inmate's crime was especially callous, or shockingly vicious or lethal, but whether the identified facts are *probative* to the central issue of *current* dangerousness when considered in light of the full record before the Board or the Governor." (*Lawrence, supra,* 44 Cal.4th at p. 1221, original italics.)

"This standard is unquestionably deferential, but certainly is not toothless, and 'due consideration' of the specified factors requires more than rote recitation of the relevant factors with no reasoning establishing a rational nexus between those factors and the necessary basis for the ultimate decision--the determination of current dangerousness." (*Lawrence, supra,* 44 Cal.4th at p. 1210.)

Where "all of the information in a postconviction record supports the determination that the inmate is rehabilitated and no longer poses a danger to public safety, and the Governor has neither disputed the petitioner's rehabilitative gains nor, importantly, related the commitment offense to current circumstances or suggested that any further rehabilitation might change the ultimate decision that petitioner remains a danger, mere recitation of the circumstances of the commitment offense, absent articulation of a rational nexus between those facts and current dangerousness, fails to provide the required 'modicum of evidence' of unsuitability." (*Lawrence*, *supra*, 44 Cal.4th at p. 1227.)

There Is No Evidence Harris Currently Poses an Unreasonable Risk to Public Safety.

As reflected in the transcript, the commissioner and deputy commissioner who conducted the rescission hearing discussed the same two factors identified by the Governor in his 2008 letter requesting en banc review of the Board's 2004 decision to grant Harris parole—the "gravity of the crime," citing the appellate decision in Harris's case, and Harris's "responsibility for his actions in the life crime," based on the autopsy report, Harris's statements and the District Attorney's comments contained in the record of the Board's 2004 hearing and decision granting Harris's parole.

In response to Harris's counsel's objections to the relitigation of the same facts before the prior Board, Presiding Commissioner Drummond acknowledged the absence of new information. According to Commissioner Drummond, however, "given three shots were fired it seems appropriate and reliable to state that it was a pump shotgun, and it had to be done by someone who was very competent with that gun because, first, the shot fired in the air would be the—the shot fired from the chamber of the shotgun. Then the pump mechanism would have to be activated to load a second round to fire again, and again to fire a third round." The Presiding Commissioner overruled Harris's counsel's objection to the Commissioner's "expert testimony." According to Commissioner Drummond, the prior Board's findings could not be reconciled with the evidence "when

you have the distance away from the shooter and the accuracy—the skill used—this was a shooting well done." "It's as simple as that." To Harris's counsel's dismay, the District Attorney argued the fact Harris had "no substantial criminal record" prior to his commitment offense weighed against him.

Over Harris's counsel's repeated objections to the constitutional infirmity of the proceedings and the meaninglessness of any grant of parole where the state has an "infinite number of tries at you," the Board found good cause to rescind Harris's parole, based on the "gravity of the life crime" and the "prisoner's responsibility for his actions in the life crime" as the appellate decision established the victim was shot in the back and Harris's statements were "in contradiction to the Appellate record, were minimizing the enormity of the crime, and showed that Harris has no evidence of understanding insight. The Panel did not deal with insight. The Panel's findings cannot be reconciled with the evidence." The Presiding Commissioner then informed Harris he was unsuitable for parole and "require[d] at least another three years incarceration."

As Harris's counsel stated, the prior Board expressly considered the appellate decision, the autopsy report and Harris's statements as well as the arguments of both the District Attorney and Harris's counsel. The first factor, the gravity of the commitment offense, standing alone, does not provide "some evidence" of Harris's current dangerousness. (*Lawrence, supra,* 44 Cal.4th at p. 1214.) While the second factor, lack of insight into the nature and magnitude of the crime, is a proper factor to be considered in determining whether an inmate poses a current threat to public safety (*Shaputis, supra,* 44 Cal.4th at pp. 1260-1261), the finding is not supported by any evidence in this record.

In the autopsy report, the medical examiner (Terence Allen, M.D.) specifically stated, "The sequence of shots is not determined at autopsy." According to the autopsy report, "multiple pellet entry wounds are consistent with two shotgun blasts showing different angles of fire." Diagrams prepared by Dr. Allen include a frontal view of Owens's body, depicting entry wounds on his left upper eyelid and right cheek as well as side views, evidencing eight separate pellet entries scattered across Owens's right upper

arm and one on the inner part of his left arm (in addition to entry wounds on Owens's "back or right back"). The district attorney had the opportunity to argue the issue, but as Harris's counsel urged, Harris's account was not inconsistent with the evidence. (See *In re Palermo* (2009) 171 Cal.App.4th 1096, 1112 (*Palermo*).)

In *Palermo, supra,* 171 Cal.App.4th 1096, the court observed the "defendant's version of the shooting of the victim was not physically impossible and did not strain credulity such that his denial of an intentional killing was delusional, dishonest or irrational. And . . . defendant accepted 'full responsibility' for his crime and expressed complete remorse; he participated effectively in rehabilitative programs while in prison; and the psychologists who evaluated him opined that he did not represent a risk of danger to the public if released on parole. Under these circumstances, his continuing insistence that the killing was the unintentional result of his foolish conduct (a claim which is not necessarily inconsistent with the evidence) does not support the Board's finding that he remains a danger to public safety.) An inmate need not agree with or adopt the official version of a crime in order to demonstrate insight or remorse. (*Id.* at p. 1110.)

Similarly, Harris's account was not irreconcilable with the evidence, and contrary to the Governor's and, in turn, the Board's characterization, the record contains numerous references to evidence of Harris's remorse, his maturation, his insight and understanding and his ongoing efforts to further improve himself in this regard. Moreover, the psychiatric evidence supported the conclusion that Harris posed a lower than average risk of violence if released on parole. Further, the Governor and then the Board did not articulate a rational nexus between the alleged contradictions between Harris's statements and the appellate decision and his current risk of dangerous; in light of Harris's acceptance of responsibility for the commitment offense, his expressions of remorse, his psychological assessments and his exemplary prison record, there was no evidence Harris posed a current risk of dangerousness if released on parole. (*Shaputis, supra,* 44 Cal.4th 1241; and see *In re Moses* (2010) 182 Cal.App.4th 1279.)

III. We Reject the Contention that the Trial Court Granted an Improper Remedy.

In *In re Prather* (*Prather*) (2010) 50 Cal.4th 238, our Supreme Court determined that "when a reviewing court concludes that a *decision to deny parole* by the Board is not supported by 'some evidence' that a prisoner remains a current threat to public safety," a "decision granting habeas corpus relief *in these circumstances* generally should direct the Board to conduct a *new parole-suitability hearing* in accordance with due process of law and consistent with the decision of the court, and should not place improper limitations on the type of evidence the Board is statutorily obligated to consider." (*Id.* at pp. 243-244, italics added.) The *Prather* court addressed the Board's denial of parole in the first instance and emphasized that "an order generally directing the Board to proceed in accordance with due process of law does not entitle the Board to 'disregard a judicial determination regarding the sufficiency of the evidence [of current dangerousness] and to simply repeat the same decision on the same record.'" (*Id*. at p. 258, citation omitted; cf. *In re McDonald* (*McDonald*) (Nov. 2, 2010, B219424) __ Cal.App.4th __ [pp. 15-19] [2010 Cal.App.Lexis 1876].)[12]

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12 Recently, in *In re McDonald* (*McDonald*) (Nov. 2, 2010, B219424) __ Cal.App.4th __ [2010 Cal.App.Lexis 1876], we rejected the People's argument that, upon reversal of a decision to deny parole, remand to the Executive Branch is always mandated under our Supreme Court's decision in *Prather, supra,* 50 Cal.4th 238. Unlike *Prather*, which addressed the *Board's* denial of parole at the time of an inmate's *suitability* hearing, *McDonald* involved the *Governor's reversal* of a Board determination of suitability for parole. As we observed in *McDonald*, our Supreme Court in *Lawrence, supra,* 44 Cal.4th 1181, in considering a Governor's reversal of a Board determination of parole suitability, had affirmed a prior order for the inmate's immediate release, without return to the Governor for further consideration. Also in contrast to the circumstances addressed in *Prather*, this appeal involves the Board's decision to *rescind* its own prior grant of parole subsequent to the Governor's request for an en banc hearing before the Board. While we recognize our decision in *McDonald* is not yet final, for the same reasons addressed in *McDonald* and in this case, we conclude, in balancing the inmate's right to due process against the authority of the Executive Branch to make the necessary parole determinations, there are circumstances in which remand is not the proper remedy where such remand would result in constitutionally impermissible opportunities to

While the Board is authorized to hold a hearing and gather evidence, as Justice Moreno notes in his concurring opinion in *Prather, supra*, 50 Cal.4th 238, the Board is obligated to state all of the reasons for its actions rather than withholding some in the event of a reversal "in light of the injunction in *In re Sturm* (1974) 11 Cal.3d 258, 272 [113 Cal.Rptr. 361, 521 P.2d 97] (*Sturm*), that due process requires the Board to provide a 'definitive written statement of its reasons for denying parole.'" (*Id.* at p. 260 (conc. opn. of Moreno, J.), citing *In re Sturm* (1974) 11 Cal.3d 258, 272.) "This requirement follow[s] from the principle that a prisoner has the right to be '"'duly considered'"' for parole and not to be denied parole arbitrarily, and that such rights 'cannot exist in any practical sense unless there also exists a remedy against their abrogation.'" (*Prather, supra,* 50 Cal.4th at p. 260 (conc. opn. of Moreno, J.), citing *Sturm, supra,* 11 Cal.3d at p. 268.) A definitive written statement of reasons is "necessary to guarantee that such an effective remedy exists, because, inter alia, it will help to ensure 'an adequate basis for judicial review.'" (*Prather, supra,* 50 Cal.4th at p. 260 (conc. opn. of Moreno, J.), citing *Sturm, supra,* 11 Cal.3d at p. 272.)

Accordingly, after having its parole rescission decision reversed, the Board cannot have a "second bite at the apple" to again rescind parole on the same record where, as here, the Board granted Harris parole *six years ago*, based on his *below average risk of violence*, continued to *advance* his parole date on the basis of the record of only positive progress before it, and he *actually reached* his approved release date, only to have the Governor's referral for en banc review result in the Board's decision to rescind his parole and further delay his release where no evidence whatsoever supports a finding of current dangerousness. "Such piecemeal litigation would undermine the prisoner's right to a fair hearing and the ability of courts to judicially review and grant effective remedies for the wrongful denial of parole." (*Prather, supra,* 50 Cal.4th at pp. 260-261 (conc. opn. of

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"'simply repeat the same decision on the same record.'" (*Prather, supra*, 50 Cal.4th at p. 258, citation omitted.)

Moreno, J.).) On this record, it follows that the trial court's order is properly affirmed in accordance with due process of law.

DISPOSITION

The order is affirmed.

WOODS, J.

We concur:

PERLUSS, P. J. **ZELON, J.**